Petition

81-1360

Office - Supreme Court, U.S.
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NO.

in the
Supreme Court
of the
United States

IN THE MATTER OF:
DOUGLAS W. OESTERLE
BANKRUPT

THE HOME INDEMNITY COMPANY
AND
THE NATIONAL INDEMNITY COMPANY
Plaintiff/Appellant

vs.

DOUGLAS W. OESTERLE
Defendant/Appellee

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1.

Whether Bankruptcy Rule 407 requires the party objecting to the discharge of a bankrupt to carry the burden of persuasion after the objecting party has established a prima facie case.

QUESTION 2.

Whether Bankruptcy Rule 407 requires the party objecting to the discharge of a bankrupt to carry the burden of persuasion when the bankrupt invokes the *"justification exception"* to Section 14(c)(2) of the Bankruptcy Act.

QUESTION 3.

Whether a bankrupt who was a responsible officer of a corporation that declared bankruptcy several years prior to the individual filing his petition in bankruptcy is required to produce his personal books and records (and/or the corporation's books and records) which were maintained during the time period when the vast majority of debts reflected in the individual petition were incurred in order to satisfy the requirement of Section 14(c)(2) of the Bankruptcy Act.

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REFERENCE TO THE OFFICIAL OPINION

This case has been officially reported as *In the Matter of Oesterle*, 651 F.2d 401 (5th Cir. 1981).

STATEMENT ON JURISDICTION

On July 24, 1981, the United States Fifth Circuit Court of Appeals affirmed the granting of Douglas W. Oesterle's petition in Bankruptcy.

On October 14, 1981, the Fifth Circuit Court of Appeals denied the Appellants' Petition for Rehearing En Banc.

Appellants rely on 28 U.S.C. §1254 as a basis for the Petition for Writ of Certiorari.

STATUTES UNDER CONSIDERATION

Bankruptcy Act §14, sub. (c)(2), 11 U.S.C.A. §32(c)(2), (1976)

Discharges when granted:

> (c) The court shall grant the discharge unless satisfied that the bankrupt has (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of accounts or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case.

11 U.S.C.A. §727(a)(3)(1978)

§727. Discharge:

(a) The court shall grant the debtor a discharge, unless—

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Bankruptcy Rule 407:

BURDEN OF PROOF IN OBJECTING TO DISCHARGE

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection.

Advisory Committee's Note

This rule is an adaptation of Cal.Evid. Code §500, which sets out the basic rule governing burden of proof in civil litigation. The rule supersedes the proviso at the end of §14c of the Act. The proviso has generally been equated with a requirement that the objector make a prima facie case under §14c. See, e.g., *In re*

Pioch, 235 F.2d 903, 905 (3d Cir. 1956) ("the burden of proof is on the objecting creditor to prevent the bankrupt's discharge, otherwise stated, the objecting creditor must make out a prima facie case"). See also *Feldenstein v. Radio Distributing Co.*, 323 F.2d 892, 893 (6th Cir. 1963); *Johnson v. Bockman*, 282 F.2d 544, 545 (10th Cir. 1960); *Industrial Bank of Commerce v. Bissell*, 219 F.2d 624, 625-26 (2d Cir. 1955); *Dixwell v. Scott & Co., Ltd.*, 115 F.2d 873, 875 (1st Cir. 1940); 1 Collier 1314.1-1314.2 (1971).

This rule does not deal with the burden of going forward with the evidence. Subject to the allocation by the rule of the initial burden of producing evidence and the ultimate burden of persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence in the light of such considerations as the difficulties of proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the bankrupt than to the objector. See, e.g., *In re Haggerty*, 165 F.2d 977, 979-80 (2d Cir. 1948); *Federal Provision Co. v. Ershowsky*, 94 F.2d 574, 575 (2d Cir. 1938); *In re Riceputo*, 41 F.Supp. 926, 927-28 (E.D.N.Y. 1941).

STATEMENT OF THE CASE

1. Douglas W. Oesterle was the Key officer and stockholder of two multi-million dollar corporations, B.K.R., Inc. and Oesterle Nevada, Inc.

2. These two corporations filed petitions in Bankruptcy in 1974.

3. Between 1974 and 1978 Oesterle operated a business as a private tax consultant. His only business record for that time period consisted of his 1975 tax return.

4. In September 1978, Oesterle filed a voluntary petition in bankruptcy, listing debts of 16 million dollars, and assets of $47.00. The vast majority of the scheduled debts were a result of the personal guarantees of the corporation.

5. Appellant, THE HOME INDEMNITY COMPANY, became surety on two bonds to the Oesterle Nevada Corporation in June 1973. One was in favor of the Department of Taxation of the State of Nevada. The other was in favor of the Nevada Industrial Commission. As a pre-requisite to the issuance of these bonds, DOUGLAS W. OESTERLE executed a General Indemnity Agreement in his individual capacity. The Oesterle Nevada Corporation defaulted on its obligation, thereby obligating THE HOME INDEMNITY COMPANY to fulfill the conditions required under the bonds, but DOUGLAS W. OESTERLE has refused to indemnify and repay them according to the terms of the Agreement. A Default Judgment was entered against him in Nevada on July 7, 1977 for $16,110.69, plus costs and attorneys' fees. On October 4, 1978 a Final Judgment was entered

in Dade County, Florida, for the sum of $22,651.82. Despite the entry of this Judgment, Oesterle has refused to pay.

6. Appellant, NATIONAL INDEMNITY COMPANY, became surety on eight bonds issued to B.K.R., Inc., and Oesterle Nevada Corporation. Six of the bonds were issued to B.K.R., Inc., in favor of the State of Nevada. One was issued to the Oesterle Nevada Corporation in favor of the Nevada Power Company. The other was also issued to the Oesterle Nevada Corporation in favor of the Central Telephone Company. As a pre-requisite to the issuance of these bonds, DOUGLAS W. OESTERLE executed a General Indemnity Agreement in his individual capacity. Both the Oesterle Nevada Corporation and B.K.R., Inc., defaulted on their obligations, thereby obligating NATIONAL INDEMNITY COMPANY to fullfill the conditions required under the bonds. The Company has made demand for repayment of the sums paid under the bonds, but DOUGLAS W. OESTERLE has refused to indemnity and repay them according to the terms of their Agreement. A Default Judgment was entered against him in Nevada on January 22, 1976 for $45,203.64, plus costs of suit. On February 23, 1977, a Final Judgment was entered in Dade County, Florida, for the sum of $46,459.12. Despite entry of this Judgment, Oesterle has refused to pay.

7. On July 17, 1979, the trial of the action took place before the U.S. District Court, Bankruptcy Division, in Miami, Florida, before the Honorable Thomas C. Britton. At that time, the Bankrupt failed to attend. A Stipulation was entered into between the Bankrupt's attorney and the objecting creditor's attorney, that the record would consist of the Bankrupt's examination, under Bankruptcy Rule 205, on March 26, 1979 and

May 14, 1979, his deposition on May 17, 1977 in a civil acting then pending in the State Court, and a copy of 1975 tax return and the bankruptcy schedules filed in this case. With the above Stipulation, the Plaintiff waived any objection under §14(e) for the Bankrupt's failure to attend this hearing.

8. A Judgment dismissing the Complaint Objecting to the Discharge of Bankrupt, together with the Trial Judge's findings of facts and conclusions of law, was entered July 24, 1979. Thereafter, on July 31, 1979 THE HOME INDEMNITY COMPANY and THE NATIONAL INDEMNITY COMPANY filed an appeal from that Judgment.

9. A Judgment affirming the decision of the Bankruptcy Judge was entered by the District Court on July 17, 1980. Thereafter, on August 15, 1980, THE HOME INDEMNITY COMPANY and THE NATIONAL INDEMNITY COMPANY filed a joint appeal to the Fifth Circuit Court of Appeals.

10. On April 28, 1981 the Fifth Circuit Court of Appeals heard oral argument before Justices Gewin, Roney and Hatchett.

11. On July 24, 1981 the Fifth Circuit Court of Appeals affirmed the decision of the District Court by quorum due to the death of Justice Gewin.

12. On August 5, 1981 the Appellant filed a petition for rehearing En Banc. This petition was denied on October 14, 1981.

13. On August 6, 1981, the Appellant filed a petition for Panel Rehearing. This petition was denied on September 11, 1981.

REASONS FOR THE ALLOWANCE OF THE WRIT

Appellants Home Indemnity Company and National submit that this case is worthy of consideration by this Court for several reasons. First, there now exists a direct conflict between the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals as to whether under Bankruptcy Rule 407 the bankrupt or the objecting creditor (or trustee) has the burden of persuasion after the objecting creditor (or trustee) establishes a prima facie case, under Section 14(c)(2) of the Bankruptcy Act.[1] The Ninth Circuit Court of Appeals decision *In the Matter of Horton*, 621 F.2d 968 (9th Cir. 1980) stated:

> *III Legal Burden of Proof*
>
> Finally, Horton complains that the burden of proof was confused and unfairly cast upon him. He relies upon Bankruptcy Rule 407 which places the burden of proving a prima facie case against discharge on the objecting Trustee. *Once the Trustee has shown that the bankrupt's records are inadequate, the burden shifts to*

[1]Although this case is governed by the Former Bankruptcy Act, Appellant points out that Section 11 U.S.C. 727(a)(3) of the new Act is nearly identical in its language to Section 11 U.S.C. 32(c) Section 14(c)(2) of the Bankruptcy Act.

Furthermore, Bankruptcy Rule 407 applies to both the new and the old Act.

> *the bankrupt to justify the nonexistence* of these records. *Moffet v. Union Bank*, 378 F.2d 10 (9th Cir. 1967); *Gunzburg v. Johannsen*, 300 F.2d 40 (5th Cir. 1962). The record explicitly and implicitly indicates that the bankruptcy judge correctly applied these presumptions and burden of proof. Horton's argument to the contrary is without merit.
>
> For the foregoing reasons, the decision below is AFFIRMED.
>
> (Emphasis added) *Id.* at 972.

The Fifth Circuit *In the Matter of Oesterle*, 651 F.2d 401 (5th Cir. 1981) stated:

> Since Oesterle admits that he failed to maintain any financial records after 1974, Home Indemnity has no difficulty making out its prima facie case of inadequate record-keeping. The same is true with regard to Oesterle's failure to provide the pre-1974 records turned over to the Nevada bankruptcy trustee.
>
> Even with regard to the defense of justification for this inadequacy, the plain meaning of Rule 407 now requires that we place the burden of persuasion upon the party objecting to discharge . . ." *Id.* at 403.

In addition to the direct conflict between Fifth and Ninth Circuit Court of Appeal, appellants point out that the Second Circuit Court of Appeals was also concerned with this issue. *In the Matter of Martin*, 554

F.2d 55 (2nd Cir. 1977), the Court did not resolve this issue but stated:

> . . . Problems seem to have arisen in this case because of uncertainty over who has the burden of going forward on this issue. Regardless where the ultimate burden of persuasion lies, assignment of the initial burden of production depends on the circumstances, see Advisory Committee's Note to Bankruptcy Rule 407; relative accessibility of the records and relative capabilities of the parties should be taken into account. See, e.g., *In re Romano*, 196 F.Supp. 854, 958-59 (E.D. Tenn. 1961). *Unfortunately, each side in this case apparently thought the other had the burden of production.*
>
> This issue should be resolved upon remand.
>
> (Emphasis added)
> (Footnote omitted) *Id.* at 58.

The second reason is that this case is worthy of consideration by this court as the need for a determination as to effect of Bankruptcy Rule 407 on the "justification exception" to the Section 14 (c)(2) requirements. As was previously discussed, the Fifth Circuit *In the Matter of Oesterle* 651 F.2d 401 (5th Cir. 1981) has applied the burden of persuasion upon the objecting creditor even when the Bankrupt invokes the *"justification exception"*. The Fifth Circuit stated:

> While one commentator has questioned the logic and necessity of reading Rule 407 in this way 12 Collier on Bankruptcy ¶407.3 [1], we note that the committee responsible for drafting

the Rule stated explicitly in its advisory note that the Rule was meant to "supercede" the proviso in section 14(c) which placed the burden on the bankrupt. Were we responsible for writing the law and rules of bankruptcy, we might well agree that the bankrupt should continue to bear the burden of persuasion since he usually possesses the evidence of any justification for his failure to maintain records. See *Matter of Decker*, 595 F.2d 185 (3rd Cir. 1975). *We also recognize that the objector is now in the difficult and anomalous position* of *trying to prove a negative by showing the absence of any justification.* This *court nevertheless feels compelled to* apply *law as it is written*, leaving to other *branches of our government the task* of *rewriting the law to correct any perceived injustices.* Such judicial restraint is particularly appropriate when, as here, the rule of law has been expressed explicitly and unambiguously.

(Emphasis Added) *Id.* at 403.

Appellants point out that the Third Circuit Court of Appeals also recognized the importance and uniqueness of this issue *In the Matter of Decker* 595 F.2d 185 (3rd Cir. 1979).

> We hold that Rule 407 is a valid exercise on the Supreme Court's rule-making power and should have been applied.'
>
> Without questioning the validity of Rule 407, at least one authority has interpreted the rule as having only limited application to section

14c(2). 12 Collier on Bankruptcy ¶407.3[1] (14th ed. 1975). This interpretation arises because section 14c(2) provides that the bankrupt may demonstrate an excuse for his failure to keep or preserve adequate records. Thus, the first part of section 14c(2) states the general rule: the bankrupt will not be granted a discharge if the objector establishes that the records are inadequate to disclose the bankrupt's financial condition and material business transactions. But the second part of that subsection allows the court to grant the discharge even if the records are inadequate if "the court deems such acts or failure to have been justified under all the circumstances of the case." Collier argues against applying Rule 407 to the "justification" provision because the information necessary to establish an excuse for inadequate or nonexistent records is generally in the bankrupt's possession.

We need not decide whether Rule 407 requires the objector to hear the burden of persuasion on the issue of "justification." Decker has made no attempt to invoke the "justification" provision. Rather, he contends that his books and records are sufficient to enable him to discharge under the Act *Id.* at 189-90.

The third reason that this case worthy of consideration by this Court is the fact that the interpretation of Bankruptcy Rule 407 also would apply to the other grounds for objecting to a discharge as was recognized by the Tenth Circuit Court of Appeals

In the Matter of Amador 596 F.2d 428 (10th Cir. 1979)[2]. The Court stated:

> Appellants' point that they were placed under a burden of proving their innocence contrary to Rule 407 is not well taken. Appellee met the requirement of Rule 407 by producing evidence sufficient to establish a prima facie case of willful and malicious conversion. *Thereupon, the burden was on appellants to come forward with evidence showing, for example, that there* was *no conversion or, it there was conversion, that it was not willful and malicious. Gardner v. American Century Mortgage Investors,* 577 F.2d 928 (5th Cir. 1978); *In re Mascolo,* 505, F.2d 274 (1st Cir. 1974); *Feldenstein v. Radio Distributing Co.* 323 F.2d 892 (6th Cir. 1963); *American National Bank of Denver v. Rainguet,* 323 F.2d 881 (10th Cir. 1963); *Weinstein v. Nussbaum,* 302 F.2d 24 (2nd Cir. 1962). There is nothing in the Advisory Committee Note to Rule 407 which relieves appellants from coming forward with evidence to rebut the prima facie case established by appellee. The Advisory Committee Note states:
>
> This rule does not deal with the burden of going forward with the evidence. . . . the rule leaves to the courts the formulation of

[2]Appellant points out that although *Amador* dealt with Section 17(a)(2) of the Former Bankruptcy Act, Section 523(a)(6) of the new Bankruptcy Act is nearly identical and Bankruptcy Rule 407 is applicable to both the new and old Bankruptcy Act.

> rules governing the shift of the burden of going forward with the evidence in the light of such considerations as the difficulties or proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the bankrupt than to the objector.
>
> Evidence to establish the fact that there was no conversion or, if there was conversion, that it was not willful or malicious was peculiarly accessible to appellants, who were in a position to know what happened to monies received from depletion of the inventory and to maintain records reflecting the disposition of assets subject to appellee's secured interest. The conclusion of the Referee and of the district court that appellee's prima facie case was not overcome by appellants is clearly correct.
>
> (Emphasis Added) *Id.* at 443.

The fourth reason that this case is worthy of consideration by this Court is that need to maintain uniformity in the application of Bankruptcy Rule 407 to the objections to a discharge. Appellants respectfully requests this Court to review the following cases which have interpreted Bankruptcy Rule 407 with significantly different results. *In re Smith* 436 F.Supp. 469 (Dist. Ct., N.D. Ga 1977), *In re Lefkowitz*, 4 Bankr. Ct. Dec. 835 (S.D.N.Y. 1978) (not officially reported) aff'd without opinion sub nom, *Lefkowitz v. Schulman* 603 F.2d 213, (2nd Cir. 1979) cert. den. sub nom, *In re Lefkowitz* 444 U.S. 835, 100 S.Ct. 69, 62 L.Ed. 2d 45 (1979); *In the Matter of LeFebvre* 1 B.R. 534 (Dist. Ct., M.D. Fla.

1979); *In the Matter of Peterson* 2 B.R. 402 (Dist. Ct. S.D. Ga. 1980); *In the Matter of Russo* 3 B.R. 28 (Bankr. Ct., E.D.N.Y. 1980); *Melichar v. Ost.* 7. B.R. 951 (D.C. Md. 1980); *In the Matter of Ramos* 8 B.R. (Bankr. Ct. W.D. Wisconsin 1981), *In the Matter of Silverman* 10 B.R. 727 (Bankr. Ct. S.D.N.Y. 1981).

There is also a direct conflict between the Second Circuit and the Fifth Circuit Court of Appeals on whether the bankrupt who was a responsible officer of a corporation that incurs substantial obligations as a result of the corporate activities is required to produce either the books and records of the corporation and/or his personal records in order to satisfy the requirements of Section 14(c)(2) of the Bankruptcy Act. The Fifth Circuit Court of Appeals *In the Matter of Oesterle* 651 F.2d 401 (5th Cir. 1981) has held that it was not necessary for the bankrupt to produce those books and records when it stated:

> We may dismiss more easily the other objections raised by Home Indemnity to Oesterle's discharge in bankruptcy. As noted above, Home Indemnity challenges the failure of Oesterle to provide records of his personal finances during the period when he served as corporate principal in two corporations which filed in bankruptcy in Nevada in 1974. Nothing in the record causes us to doubt the conclusion of the bankruptcy judge that this failure was justified by Oesterle's transfer of all his pre-1974 records to the Nevada trustee in bankruptcy.

The Second Court of Appeals *In Re Halpern* 387 F.2d 312 (2nd Cir. 1968) reached the exactly opposite conclusion when it stated:

> ". . . Where the bankrupt on the other hand, is the principal or a truly responsible officer of a corporation, and incurs substantial obligations as a result of corporate activities, he is required to keep books and records. *See Karr v. Marshall*, 262 F.2d 358 (2nd Cir. 1945) (per curiam); *In re Sandow*, 151 F.2d 807, (2nd Cir. 1959). *Such a bankrupt does not meet his burden by merely referring to the corporation's books; unless the objecting creditors concede that those books will adequately show the bankrupt's financial condition and business transactions, the bankrupt must produce the books. See White v. Schoenfeld*, 117 F.2d 131 (2nd Cir. 1941) (per curiam). By the same token, production of corporate records will not suffice where the bankrupt engaged in substantial personal business not reflected on the corporate books. *In Re Muss*, 100 F.2d 395 (2d Cir. 1939).[3]
>
> *Id.* at 315, 316

Since there now exists a conflict between the Circuit Court of Appeals on this issue this Court should resolve this conflict.

---

[3]In the instant case the objecting creditor did not concede that the corporation books would adequately show the bankrupt's financial condition.

In summary, Appellants submit for the foregoing reasons this Court should grant the petition for Writ of Certorari.

CONCLUSION

Appellants, Home Indemnity Company and National Indemnity Company respectfully submit that the granting of this petition for writ of certiorari would allow this Court to resolve the conflict that presently exists between the respective Circuit Court of Appeals' decisions on the questions presented. Furthermore the questions presented to this Court have been decided differently by the various District Courts and Bankruptcy Courts. By deciding these questions this Court can resolve the conflicting decisions of the Bankruptcy Courts, the District Courts and the Circuit Court of Appeals, and thereby establish uniformity among the jurisdictions as intended by the Congress and required by the Constitution of the United States.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to Appellee's attorneys of record, Joe N. Unger, Esquire, 808 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and Louis M. Jepeway, also attorney for Douglas W. Oesterle, 619 Dade Federal Building, 101 East Flagler Street, Miami, Florida 33131 on the 11th day of January, 1982.

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BY: /s/ Alan B. Baybick
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Appendix

APPENDIX

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The Parent Company of National Indemnity Company is Berkshire Hathaway Company, New Bedford, Mass.

The Parent Company of Home Indemnity Company is The Home Insurance Company.

The Parent Company of The Home Insurance Company is City Investing Company, New York, N.Y.

In the Matter of Douglas
OESTERLE, Bankrupt.

The HOME INDEMNITY COMPANY
and the National Indemnity Company,
Plaintiffs-Appellants,

v.

Douglas W. OESTERLE,
Defendant-Appellee.

No. 80-5656.

United States Court of Appeals,
Fifth Circuit.
Unit B

July 24, 1981.

The Bankruptcy Court granted discharge in bankruptcy, and the United States District Court for the Southern District of Florida, at Ft. Lauderdale, Norman C. Roettger, Jr., J., affirmed, and creditors appealed. The Court of Appeals, Hatchett, Circuit Judge, held that there was no abuse of discretion in conclusions that: (1) bankrupt's failure to maintain financial records after 1974, while self-employed as tax consultant, was justified; (2) that bankrupt's failure to provide pre-1974 records which had been turned over to out-of-state trustee in bankruptcy was likewise excusable; and (3) that bankrupt's explanation of loss of various assets was satisfactory.

Affirmed.

1. Bankruptcy —414.1(2)

Burden of persuasion is upon party objecting to discharge for failure to maintain adequate financial records. Rules Bankr.Proc. Rule 407, 11 U.S.C.A.

2. Bankruptcy —467(4)

Finding that creditor failed to meet its burden of establishing unjustified failure by bankrupt to maintain records cannot be overturned on appeal unless creditor demonstrates clear error. Bankr.Act, §14(c)(2), 11 U.S.C.A. §32(c)(2); Rules Bankr.Proc. Rule 407, 11 U.S.C.A.

3. Bankruptcy —409(1)

Bankrupt's failure to maintain financial records is justified by showing that bankrupt's business was not of such size and complexity that keeping of books and records was necessary. Bankr.Act, §14(c)(2), 11 U.S.C.A. §32(c)(2).

4. Bankruptcy —409(1)

There was no abuse of discretion in excusing bankrupt's failure to keep any financial records after 1974, despite his tax deduction in 1975 of almost $19,000 and despite nature of bankrupt's self-employment after 1974 as a tax consultant. Bankr.Act, §14(c)(2), 11 U.S.C.A. §32(c)(2).

5. Bankruptcy —409(1)

There was no abuse of discretion in conclusion that failure of bankrupt to provide records of his personal

finances during period when he served as corporate principal in two corporations which filed for bankruptcy out of state in 1974 was justified by bankrupt's transfer of all his pre-1974 records to out-of-state trustee in bankruptcy. Bankr.Act, §14(c)(2), 11 U.S.C.A. §32(c)(2)

6. Bankruptcy —414.3(3)

There was no abuse of discretion in finding that bankrupt satisfactorily explained loss of various assets, where creditor offered no evidence of inadequacy of bankrupt's explanations. Bankr.Act, §14(c)(7), 11 U.S.C.A. §32(c)(7); Rules Bankr.Proc. Rule 407, 11 U.S.C.A.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN*, RONEY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal centers upon the proper application of section 14(c)(2) of the Bankruptcy Act, 11 U.S.A. §32(c)(2), which requires a petitioner in bankruptcy to provide records showing his financial condition. The bankruptcy judge and district court found that the petitioner's failure to maintain such records was justified under all the circumstances of this case, thus bringing the petitioner within an exception to the general requirements of section 14(c)(2). Recognizing the wide discretion conferred

*This case is being decided by a quorum due to the death of Judge Gewin on May 15, 1981. 28 U.S.C. §46(d).

by the Bankruptcy Act upon a bankruptcy judge, and finding in the record no abuse of this discretion, we affirm the discharge in bankruptcy.

Appellee, Douglas W. Oesterle, voluntarily petitioned for discharge in bankruptcy, but he provided no records of his financial condition except for one federal income tax return. This tax return claimed deductions totalling almost $19,000 in connection with Oesterle's self-employment as a tax consultant.

Appellant, The Home Indemnity Company, is one of Oesterle's creditors. Home Indemnity objected to Oesterle's discharge on the ground that he failed to maintain adequate financial records. Section 14(c)(2) of the Bankruptcy Act provides:

> The court shall grant the discharge unless satisfied that the bankrupt has . . . (2) . . . failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failures to have been justified under all the circumstances of the case . . . .

11 U.S.C. §32(c)(2).

The bankruptcy judge recognized that Oesterle had failed to maintain adequate financial records after 1974, but held that this failure was justified under all the circumstances of the case. The judge likewise excused Oesterle's failure to provide pre-1974 records on the ground that these records had been properly surrendered to a trustee in prior bankruptcy proceedings concerning

Nevada corporations controlled by Oesterle. In so ruling, the bankruptcy judge pointed to the following circumstances underlying this bankruptcy action:

> The bankrupt was engaged in a number of speculative business ventures in Nevada, which resulted in two corporate bankruptcies filed in 1974. As a result, a Reno bank obtained a personal judgment against him in the amount of $600,000 and by 1977, there were over $1 million worth of judgments outstanding against him. Since the collapse of his business ventures, he has been a private tax consultant who, because of his creditors, owned no property, had no bank accounts or stock or personal property other than the clothing he wore. He paid his office expenses in cash or with certified checks purchased for cash. All the records of his corporate business activities were, of course, surrendered to the Nevada bankruptcy trustee.
>
> It is, I believe, understandable that during the past several years he maintains no significant records, because he has been engaged in no significant business transactions and has no property. Under these circumstances, I find that his failure to have records is justified under the circumstances of this case. 1A *Collier on Bankruptcy* (14th ed.) ¶14.33.

The district court affirmed the decision of the bankruptcy judge.

Home Indemnity appeals the finding of justification for failure to provide financial records, both as to Oesterle's

pre-1974 involvement with his Nevada corporations, and as to his post-1974 activities as a private tax consultant. Home Indemnity asks us to rule that Oesterle's surrender of personal records, along with corporate records, to the Nevada bankruptcy trustee cannot justify his failure to provide these records in this petition for personal discharge. Home Indemnity likewise contends that Oesterle's failure to keep any financial records after the corporate debacle in 1974 is unjustified as a matter of law because his tax deduction in 1975 of almost $19,000 shows that he engaged in significant business transactions which would normally call for the keeping of records.

The burden of justifying a failure to maintain adequate records has traditionally fallen upon the petition in bankruptcy. *McBee v. Sliman*, 512 F.2d 40 (5th Cir. 1975); *Gunzburg v. Johannesen*, 300 F.2d 40 (5th Cir. 1962). The Rules of Bankruptcy Procedure adopted in 1973 reversed the burden of proof with regard to objections to discharge under section 14(c) of the Bankruptcy Act. *Compare* Bankruptcy Rule of Procedure 407 (one objecting to discharge "has the burden of proving the facts essential to his objection") *with* Bankruptcy Act §14(c) (proviso) ("if . . . the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which . . . would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt"). Since Oesterle admits that he failed to maintain any financial records after 1974, Home Indemnity has no difficulty making out its prima facie case of inadequate record-keeping. The same is true with regard to Oesterle's failure to provide the

pre-1974 records turned over to the Nevada bankruptcy trustee.

[1] Even with regard to the defense of justification for this inadequacy, the plain meaning of Rule 407 now requires that we place the burden of persuasion upon the party objecting to discharge. While one commentator has questioned the logic and necessity of reading Rule 407 in this way, *12 Collier on Bankruptcy* ¶407.3[1], we note that the committee responsible for drafting the Rule stated explicitly in its advisory note that the Rule was meant to "supercede" the proviso in section 14(c) which placed the burden on the bankrupt. Were we responsible for writing the law and rules of bankruptcy, we might well agree that the bankrupt should continue to bear the burden of persuasion since he usually possesses the evidence of any justification for his failure to maintain records. *See Matter of Decker*, 595 F.2d 185 (3rd Cir. 1975). We also recognize that the objector is now in the difficult and anomalous position of trying to prove a negative by showing the absence of any justification. This court nevertheless feels compelled to apply law as it is written, leaving to other branches of our government the task of rewriting the law to correct any perceived injustices. Such judicial restraint is particularly appropriate when, as here, the rule of law has been expressed explicitly and unambiguously.

[2] The finding that Home Indemnity failed to meet its burden of establishing an unjustified failure to maintain records cannot be overturned on appeal unless Home Indemnity demonstrates clear error by the district

court and bankruptcy judge.[1] *Gunzburg v. Johannesen*, 300 F.2d 40 (5th Cir. 1962). Applying this limited standard of review, we affirm the decision below to discharge Oesterle in bankruptcy.

[3] We consider first the most difficult aspect of this appeal: Oesterle's failure to keep any records after 1974. While justification for failure to maintain records depends upon all the circumstances of a case, the bankruptcy judge correctly focused upon the size and nature of Oesterle's self-employment after 1974 as a tax consultant. As we have stated before, "[o]ne form of justification is a showing that the bankrupt's business was not of such size and complexity that the keeping of books and records was necessary." *Bartolotta v. Lutz*, 485 F.2d 227 (5th Cir. 1973). Oesterle's income tax deductions approaching $19,000 in 1975 might well have caused this court to reach a different conclusion from the bankruptcy judge regarding the magnitude of Oesterle's business transactions. While "an unsophisticated wage earner dealing primarily in cash should not be denied a discharge because we failed to keep books of account," *Goff v. Russell Co.*, 495 F.2d 199, 201 (5th Cir. 1974), Oesterle's business as a tax consultant likewise precludes him from claiming ignorance of the general need for all citizens to maintain minimal financial records.

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[1]The opinion of the bankruptcy judge does not explicitly recognize that Home Indemnity had the burden of showing no justification. Home Indemnity cannot complain of any error in this regard, however, because it could only have benefited if the bankruptcy judge erred by placing the burden upon Oesterle. The bankruptcy judge would have decided in favor of Oesterle even after erroneously requiring him to prove justification by a preponderance of the evidence.

[4] Sitting as an appellate court, however, we cannot conclude that the bankruptcy judge and district court have abused their discretion in excusing Oesterle's failure to maintain records. In a long line of cases, we have generally deferred to the wide discretion entrusted by section 14(c) to the finder of fact in the specialized field of bankruptcy law; and considerably larger financial transactions were generally involved in those cases in which a failure to maintain records was found unjustified. *E.g., Goff v. Russell Co.*, 495 F.2d 199 (5th Cir. 1974) (bankrupt operated stores with gross sales totalling approximately $20,000 per week); *Gunzberg v. Johannesen*, 300 F.2d 40 (5th Cir. 1962) (bankrupt engaged in activities sufficiently large so as to result in a $100,000 diminution of assets); *Gaudet v. Cowen*, 297 F.2d 227 (5th Cir. 1961), *cert. denied*, 370 U.S. 950, 82 S.Ct. 1598, 8 L.Ed.2d 815 (1962) (bankrupt received as much as $80,000 in one transaction and $240,000 in a four year period).

[5] We may dismiss more easily the other objections raised by Home Indemnity to Oesterle's discharge in bankruptcy. As noted above, Home Indemnity challenges the failure of Oesterle to provide records of his personal finances during the period when he served as corporate principal in two corporations which filed in bankruptcy in Nevada in 1974. Nothing in the record causes us to doubt the conclusion of the bankruptcy judge that this failure was justified by Oesterle's transfer of all his pre-1974 records to the Nevada trustee in bankruptcy.

[6] Home Indemnity also argues that Oesterle failed to satisfactorily explain the loss of various assets, as required by section 14(c)(7) of the Bankruptcy Act.

11 U.S.C. §32(c)(7).[2] The only evidence in the record regarding these assets is the testimony of Oesterle that they had been sold, foreclosed upon, or turned over in partial payment of prior debts. Under Rule of Bankruptcy 407, one objecting to a discharge in bankruptcy "has the burden of proving the facts essential to his objection." Since Home Indemnity offered no evidence of the inadequacy of Oesterle's explanations, we cannot conclude that the bankruptcy court and district court abused their discretion in finding that Oesterle has complied with section 14(c) of the Bankruptcy Act.

In summary, we affirm the discharge in bankruptcy of Oesterle because we find no abuse of discretion in three conclusions reached by the bankruptcy judge and district court: (1) Oesterle's failure to maintain financial records after 1974, while self-employed as a tax consultant, was justified; (2) his failure to provide pre-1974 records which had been turned over to an out-of-state trustee in bankruptcy was likewise excusable; and (3) his explanation of the loss of various assets must be deemed satisfactory in the absence of any contradictory evidence.

AFFIRMED.

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[2]Section 14(c)(7) of the Bankruptcy Act, 11 U.S.C. §32(c)(7), provides:

> The court shall grant the discharge unless satisfied that the bankrupt . . . has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities . . . .

[FILED OCT 14 1981]
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B
NO. 80-5656

In the Matter of: DOUGLAS OESTERLE, Bankrupt.

THE HOME INDEMNITY COMPANY and
THE NATIONAL INDEMNITY COMPANY,
Plaintiffs-Appellants,

versus

DOUGLAS W. OESTERLE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

(Opinion July 24, 5 Cir., 1981, ____ F.2d ____).
(October 14, 1981)

Before GEWIN*, RONEY and HATCHETT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Judge Hatchett

United States Circuit Judge

*This case was decided by a quorum due to the death of Judge Gewin on May 15, 1981. 28 U.S.C. §46(d).

[FILED SEP 11 1981]
FOR THE FIFTH CIRCUIT
UNIT B
NO. 80-5656

In the Matter of: DOUGLAS OESTERLE, Bankrupt.

THE HOME INDEMNITY COMPANY AND
THE NATIONAL INDEMNITY COMPANY,
Plaintiffs-Appellants,

versus

DOUGLAS W. OESTERLE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(SEP 11 1981)

Before GEWIN*, RONEY, and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Judge Hatchett
United States Circuit Judge

*This case was decided by a quorum due to the death of Judge Gewin on May 15, 1981. 28 U.S.C. §46(d).

[FILED JUL 17 '80]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 78-1091-BK-NCR-B

In the Matter of: DOUGLAS W. OESTERLE, Bankrupt.

THE HOME INDEMNITY COMPANY, Adv. 3
NATIONAL INDEMNITY COMPANY, Adv. 4,
Appellants

FINAL ORDER

THIS CAUSE came on for oral argument on appeals from the Bankruptcy Court.

After consideration of the record and the arguments of counsel, the court is not convinced that the lower court was in error.

Accordingly, it is

ORDERED AND ADJUDGED that the order of the Bankruptcy Court in this matter shall be and is hereby affirmed.

DONE AND ORDERED this 17 day of July, 1980.

/s/ NORMAN C. ROETGER, JR.
U.S. District Judge

cc: Alan B. Baybick
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Bankruptcy Court

[FILED JUL 24 1979]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-1091-BK-NCR-B

In the Matter of; DOUGLAS W. OESTERLE, Bankrupt.

ADV.NO. 3

THE HOME INDEMNITY COMPANY,
Plaintiff,

v.

DOUGLAS W. OESTERLE,
Defendant.

ADV.NO. 4

NATIONAL INDEMNITY COMPANY,
Plaintiff,

v.

DOUGLAS W. OESTERLE,
Defendant.

FINDINGS AND CONCLUSIONS

Two different plaintiffs, through the same attorney, have filed virtually identical adversary complaints against the bankrupt seeking denial of discharge under §14c(2), (4), (6) and (7) of the Act (11 U.S.C. §32). (C.P. No. 1). The

bankrupt has filed identical answers. (C.P. No. 5). The two matters were tried together before me on July 19, 1979. This order is a memorandum of decision under B.R. 752(a).

Without objection, the record before me consists of the bankrupt's examination under B.R. 205 on May 14 and May 16, 1979, his examination by deposition on May 17, 1977 in a civil action then pending in the State court, and a copy of a 1975 tax return and the bankruptcy schedules filed in this case. With this stipulation, plaintiff waived any objection, under §14e, to the bankrupt's failure to attend this hearing.

Plaintiffs have alleged that the bankrupt failed to keep records from which his financial condition and business transactions might be ascertained. Under §14c(2) this would be a ground for denial of discharge "unless the court deems such acts or failure to have been justified under all the circumstances of the case".

The evidence satisfies me that the failure to keep records of recent business activities in this instance is justified.

The bankrupt was engaged in a number of speculative business ventures in Nevada, which resulted in two corporate bankruptcies filed in 1974. As a result, a Reno bank obtained a personal judgment against him in the amount of $600,000 and by 1977, there were over $1 million worth of judgments outstanding against him. Since the collapse of his business ventures, he has been a private tax consultant who, because of his creditors, owned no property, had no bank accounts or stock or

personal property other than the clothing he wore. He paid his office expenses in cash or with certified checks purchased for cash. All the records of his corporate business activities were, of course, surrendered to the Nevada bankruptcy trustee.

It is, I believe, understandable that during the past several years he maintains no significant records, because he has been engaged in no significant business transactions and has no property. Under these circumstances, I find that his failure to have records is justified under the circumstances of this case. 1A *Collier on Bankruptcy* (14th ed.) ¶14.33.

Plaintiffs have next alleged that the bankrupt transferred some farm land in Georgia within twelve months before bankruptcy with intent to hinder or defraud creditors. This would be a ground for denial of discharge under §14c(4). There is no evidence before me which would support this charge and I find that the bankrupt made no such transfer within the twelve month period preceding the filing of this bankruptcy on September 26, 1978.

Plaintiffs have alleged that the bankrupt's failure to pay $70 to the court reporter in compliance with this court's order of March 12, 1979 constitutes a basis for denial of discharge under §14c(6) of the Act. This order was the taxing of costs for a court reporter's fee incurred by the trustee as a result of the bankrupt's failure to appear for an examination, which he later submitted himself to. There is no evidence that the bankrupt was able to pay these costs and inability to pay a money judgment is not a ground for denial of discharge. 1A *Collier on Bankruptcy* (14th ed.) §14.57 n. 6.

Plaintiffs have next alleged that the bankrupt failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities. There is no evidence before me of any unexplained losses of assets which would support this allegation. 1A *Collier on Bankruptcy* (14th ed.) ¶14.59. I find that the bankrupt has not failed to explain satisfactorily losses of assets.

It follows that the complaints must be dismissed and, as is required by B.R. 921(a), separate judgments will be entered dismissing the two complaints. Costs, if any, will be taxed on motion.

DONE and ORDERED at Miami, Florida, this 24th day of July, 1979.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

Copies furnished to:
Louis M. Jepeway, Esquire
Alan B. Baybick, Esquire

[FILED MIAMI, FLORIDA]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 78-1091-BK-NCR-B

ADV.NO. 3

In the Matter of; DOUGLAS W. OESTERLE, Bankrupt.

THE HOME INDEMNITY COMPANY,
Plaintiff,

v.

DOUGLAS W. OESTERLE,
Defendant.

JUDGMENT

This action came on for trial before the court on July 19, 1979. A decision incorporating the court's findings and conclusions has been entered this day. It is,

ORDERED and ADJUDGED that this complaint be dismissed. Costs, if any, will be taxed on motion.

DONE and ORDERED at Miami, Florida, this 24th day of July, 1979.

/s/ Thomas C. Britton
Thomas C. Britton
Bankruptcy Judge

Copies furnished to:
Louis M. Jepeway, Esquire
Alan B. Baybick, Esquire

[FILED JUL 24, 1979]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 78-1091-BK-NCR-B

ADV.NO. 4

In the Matter of; DOUGLAS W. OESTERLE, Bankrupt.

NATIONAL INDEMNITY COMPANY,
Plaintiff,

v.

DOUGLAS W. OESTERLE,
Defendant.

JUDGMENT

This action came on for trial before the court on July 19, 1979. A decision incorporating the court's findings and conclusions has been entered this day. It is,

ORDERED and ADJUDGED that this complaint be dismissed. Costs, if any, will be taxed on motion.

DONE and ORDERED at Miami, Florida, this 24th day of July, 1979.

/s/ Thomas C. Britton
Thomas C. Britton
Bankruptcy Judge

Copies furnished to:
Louis M. Jepeway, Esquire
Alan B. Baybick, Esquire